A

Public Prosecutor v Hasbi bin M Kusin & Anor

B

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45–20 OF 2006
NALLINI PATHMANATHAN JC
6 NOVEMBER 2007

C

Criminal Law — Common intention — Trafficking — Whether element of acting in concert or pre-planning to act together proved — Penal Code s 34

D

Criminal Law — Dangerous drugs — Trafficking — Whether both accused who were rider and pillion of motorcycle had possession of subject drugs — Proximity to package containing drugs considered — Whether accused merely had passive possession of drugs — Dangerous Drugs Act 1952 s 39B(1)(a)

E

Evidence — Burden of proof — Prosecution's burden — Failure to document seizure of motorcycle and keys before surrendering exhibits to investigating officer — Whether gap in chain of evidence — Whether doubt in prosecution's case

F

Evidence — Burden of proof — Prosecution's burden — Failure to procure 'Closed Circuit Television' recording ('CCTV') records — Whether fatal to prosecution's case

G

Evidence — Expert evidence — Chemist's evidence — Government chemist — Whether uncertainty as to weight of drugs — Whether weighing machine was functioning efficiently

H

Evidence — Police investigation — Whether tampering of subject drugs by arresting officer while in custody of police — Whether exhibit produced in court was rectangular block seized by arresting officer

I

Evidence — Prosecution case — Failure to call witness — Whether failure to call owner of motorcycle fatal to prosecution case

The two accused were charged with trafficking in 876g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'), punishable under

s 39B(2) of the Act read in conjunction with s 34 of the Penal Code. They were on a motorcycle and had entered a petrol station when arrested. According to SP3, the rider (first accused) tried to run away whereupon a short scuffle ensued for a few minutes before he was caught. When SP3 took a package he had earlier noted from the basket of the motorcycle and opened the red and white plastic bag in front of both the accused, he found a solid rectangular block that was in turn wrapped in a transparent plastic covering and aluminum foil. Inside, SP3 found a substance comprising dried plant material which were later confirmed as cannabis. Many issues were argued before the court, inter alia: (1) SP3 had not documented the seizure of the motorcycle and the keys in the form recording the transfer and surrender of exhibits to the investigating officer SP6 (exh D15). Accordingly, this threw doubt as to whether SP3 and SP4 actually saw the two accused on the motorcycle; (2) there was no attempt made by SP6 to procure records of a 'Closed Circuit Television' recording ('CCTV') records which would have documented contemporaneously and accurately the events of that night; (3) there uncertainty as to whether the weight of the drugs was 876g or 876.84g of cannabis; (4) the weighing machine that SP2 (the government chemist) used was not functioning efficiently because there was insufficient evidence produced to show that it had been calibrated routinely; (5) SP3 had tampered with the subject drugs while it was in the custody of the police, such that the exhibit produced in court was not the rectangular block seized by SP3, giving rise to a gap in the chain of evidence; (6) whether the first and second accused had possession of the subject drugs; (7) the investigation undertaken by SP6 was incomplete as the owner of the motorcycle was neither ascertained nor called to testify in court; and (8) whether 'common intention' under s 34 of the Penal Code been proven.

Held, convicting the first accused under s 6 of the Act and acquitting the second accused:

(1) There was no inherent improbability in the evidence of SP3 and SP4. Neither were there material contradictions raised in their evidence of having seen the first and second accused on the motorcycle, entering the petrol station at about 11pm on 5 June 2004 (see para 52).

(2) While there was an omission to document the seizure and transfer of the motorcycle and the keys important in the relevant forms, there was sufficient independent and corroborative evidence from SP4 and SP6 to show that these exhibits had been received on the very night of their seizure. Accordingly there was no 'break' in the chain of evidence, nor did there appear to be any attempt to 'create' and 'link' these exhibits to the accused by reason of the omission of SP3 to include these items in the relevant form (see para 54).

(3) While indeed the production of the CCTV evidence would have been extremely useful, the failure to investigate and ascertain whether there were CCTV records, and produce them if they did exist, was not fatal. The oral evidence of SP3 and SP4 was sufficient to establish prima facie that the two accused were riding the motorcycle, as there were no material contradictions in their evidence and as it was not inherently incredible (see para 57).

(4) There was no doubt that the weight of the drugs to the nearest hundredth of a gram or two decimal places was 876.84g, while the weight to the nearest gram was 876g. There was no discrepancy that had arisen in relation to the weight. Instead it was the mode of reporting that was being questioned. This issue did not serve to invalidate the prosecution's case (see para 67). Also SP2's oral evidence to the effect that calibration was undertaken by the staff of the Department every morning was sufficient evidence of efforts made to ensure the accuracy and calibration of the machines/scales utilized to weigh the subject drugs (see para 69).

(5) There was no merit in the issue of alleged 'tampering' resulting in a gap in the chain of evidence. There was no doubt that the block that was analysed and subsequently produced in court, was the block that was seized (see para 78).

(6) The carrier basket of the motorcycle was located on the inner side of the motorcycle in front of, and between the legs of the first accused when he was sitting astride the motorcycle. The distance between the red and white package and the first accused when he was sitting astride or riding the motorcycle would be a matter of inches. It would follow from the fact of the clear visibility and close proximity between the red and white plastic package and the first accused that he also had custody and control of the white and red plastic package (see para 86).

(7) Although the red and white package was visible to the second accused and relatively proximate to him, the presence of the first accused as the rider who had control of the motorcycle and the carrier basket comprising a component part of the motorcycle within which the drugs were contained, suggested that control and custody was with the first accused rather than the second accused (see para 90). Furthermore, the first accused could have dealt with or disposed of the package which was situated in the carrier basket in front of him and proximate to him to the exclusion of the second accused. While it may seem inequitable indeed that a matter of inches should make a difference between having and not having custody, it was indeed the proximity and accessibility of the first accused to the package which distinguished the situation between the first and second accused and pointed towards custody and control of the package being with him rather than the second accused.

In these circumstances, the second accused did not have custody and control of the red and white package (see para 94).

(8) The failure to call the owner of the motorcycle was not fatal. What was in issue was establishing the 'possession' of the drugs. The drugs were contained in the red and white plastic package which in turn was located in the carrier basket of the motorcycle. As such it was possession of the white and red plastic bag and not ownership of the motorcycle that was fundamental for the purposes of establishing a prima facie case (see para 99).

(9) While the first accused may well have been carrying the goods while riding a motorcycle, there was no other evidence which showed that he was taking or conveying the cannabis from one place to another. In these circumstances these facts fail to evidence 'transport' in that they did not show that the cannabis was 'conveyed' or taken from one particular place to another by the first accused. Further proof was necessary to show that the first accused's possession of the cannabis amounted to a conveyance of the cannabis from one person or place to another, rather than mere or passive possession. In the absence of such evidence, 'transporting' and thereby 'trafficking' could not be established against the first accused. Needless to say, in the absence of a finding of 'possession' as against the second accused, this issue of 'trafficking' did not even arise (see para 101).

(10) There was no evidence of either prior concert or pre-planning to act together that could be gleaned from the circumstances surrounding the incident. Nor was any attempt made during the course of submissions to highlight any evidence or inference that could be drawn of such 'common intention'. The only act in respect of which the two accused persons could be said to have acted in unity was the act of being on the motorcycle and riding into the petrol station. In the absence of any further evidence being adduced by the prosecution to evidence any element of acting in concert or pre-planning to act together, the element of 'common intention' was not proved. The prosecution had therefore failed to prove an essential ingredient of the offence at the prima facie stage (see para 105).

[Bahasa Malaysia summary

Kedua-dua tertuduh telah dituduh mengedar 876g kanabis di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut'), yang boleh dihukum di bawah s 39B(2) Akta tersebut dibaca bersama s 34 Kanun Keseksaan. Mereka sedang menaiki motosikal dan semasa memasuki stesen petrol mereka ditangkap. Menurut SP3, pembonceng itu (tertuduh pertama) cuba melarikan diri di mana pergelutan berlaku untuk beberapa minit

sebelum beliau ditangkap. Semasa SP3 mengambil bungkusan yang beliau terlihat dalam bakul motosikal tersebut dan membuka beg plastik merah dan putih di hadapan kedua-dua tertuduh, beliau menemui satu blok segi empat tepat yang dibungkus dalam plastik lut sinar dan kerajang aluminium. Di dalamnya, SP3 menemui bahan yang mengandungi bahan tumbuhan kering yang kemudiannya disahkan kanabis. Banyak isu telah dihujahkan di hadapan mahkamah, antara lain: (1) SP3 tidak mendokumenkan rampasan motosikal itu dan kuncinya dalam bentuk rakaman pemindahan dan penyerahan ekshibit-ekshibit kepada pegawai penyiasat SP6 (eksh D15). Sewajarnya, ini menimbulkan keraguan sama ada SP3 dan SP4 sememangnya telah melihat kedua-dua tertuduh atas motosikal tersebut; (2) tiada percubaan dibuat oleh SP6 untuk mendapat rekod-rekod rakaman 'Closed Circuit Television' ('CCTV') yang sememangnya telah mendokumenkan kejadian-kejadian sewaktu dan setepat-tepatnya yang berlaku malam itu; (3) terdapat ketidakpastian berhubung sama ada berat dadah itu adalah 876g atau 876.84g kanabis; (4) mesin timbang yang digunakan oleh SP2 (ahli kima kerajaan) tidak berfungsi dengan betul kerana terdapat keterangan yang tidak memadai yang telah dikemukakan untuk menunjukkan bahawa ia digunakan untuk menentukur setiap hari; (5) SP3 telah mengusik dadah tersebut semasa ia beradan dalam kawalan polis, yang mana ekshibit yang kemukakan dalam mahkamah bukan blok segi empat tepat yang dirampas oleh SP3, yang menimbulkan jurang dalam rangkaian keterangan; (6) sama ada tertuduh pertama dan kedua memiliki dadah tersebut; (7) siasatan yang dilakukan oleh SP6 tidak lengkap kerana pemilik motosikal tidak dikenalpasti mahupun dipanggil untuk memberi keterangan di mahkamah; dan (8) sama ada 'common intention' di bawah s 34 Kanun Keseksaan telah dibuktikan.

Diputuskan, menyabitkan tertuduh pertama di bawah s 6 Akta tersebut dan membebaskan tertuduh kedua:

(1) Tiada kebarangkalian yang sedia ada dalam keterangan SP3 dan SP4. Mahupun terdapat percanggahan yang ketara ditimbulkan dalam keterangan mereka yang telah melihat tertuduh pertama dan kedua atas motosikal tersebut, memasuki stesen petrol itu lebih kurang pukul 11 malam pada 5 Jun 2004 (lihat perenggan 52).

(2) Meskipun terdapat peninggalan untuk mendokumenkan rampasan dan pemindahan motosikal dan kunci yang penting dalam borang-borang relevan, terdapat keterangan memadai yang berasingan dan menyokong daripada SP4 dan SP6 untuk menunjukkan bahawa ekshibit-ekshibit tersebut telah diterima pada malam rampasan itu. Sewajarnya tiada ada 'break' dalam rangkaian keterangan, mahupun terdapat apa-apa percubaan untuk 'create' dan 'link' ekshibit-ekshibit tersebut kepada

tertuduh oleh sebab peninggalan SP3 untuk memasukkan item-item tersebut dalam borang yang berkaitan (lihat perenggan 54).

(3) Meskipun penghasilan keterangan CCTV amat berguna, kegagalan menyiasat dan mengenalpasti sama ada terdapat rekod-rekod CCTV, dan menghasilkannya jika ada, adalah tidak memudaratkan. Keterangan lisan SP3 dan SP4 adalah memadai untuk membuktikan prima facie bahawa kedua-dua tertuduh membonceng motosikal itu, kerana tiada percanggahan dalam keterangan mereka dan disebabkan ia tidaklah suatu yang mustahil (lihat perenggan 57).

(4) Tiada keraguan bahawa berat dadah pada gram peratusan atau kedudukan dua titik perpuluhan yang paling hampir adalah 876.84g, manakala berat gram terhampir adalah 876g. Tiada pertikaian yang timbul berkaitan berat tersebut. Sebaliknya, ia adalah cara laporan itu dipersoalkan. Isu ini tidak digunakan untuk menjadikan kes pendakwaan tidak sah (lihat perenggan 67). Keterangan lisan SP2 juga yang mengatakan penentukuran dilakukan oleh pekerja Jabatan itu setiap hari merupakan keterangan memadai tentang usaha yang dibuat untuk memastikan ketepatan dan penetukuran mesin/skala digunakan untuk menimbang dadah itu (lihat perenggan 69).

(5) Tiada merit dalam isu 'tampering' yang dikatakan akibat jurang dalam rangkaian keterangan. Tiada keraguan bahawa blok yang dianalisa itu dan kemudiannya dikemukakan di mahkamah, merupakan blok yang dirampas (lihat perenggan 78).

(6) Bakul pembawa motosikal itu terletak di bahagian dalam motosikal di hadapannya, dan antara kedua-dua kaki tertuduh pertama apabila beliau duduk bercelapak atas motosikal itu. Jarak antara bungkusan merah dan putih dan tertuduh pertama semasa beliau duduk bercelapak atau membonceng motosikal itu mungkin beberapa inci sahaja. Berdasarkan fakta darjah penglihatan yang jelas dan jarak dekat antara bungkusan merah dan putih dan tertuduh pertama yang mana beliau juga mempunyai jagaan dan kawalan ke atas bungkusan putih dan merah itu (lihat perenggan 86).

(7) Meskipun bungkusan merah dan putih dapat dilihat oleh tertuduh kedua dan dekat juga dengannya, kehadiran tertuduh pertama sebagai penunggang yang mempunyai kawalan ke atas motosikal dan bakul pembawa yang merupakan sebahagian daripada motosikal yang man dadah itu diletakkan, mencadangkan bahawa kawalan dan jagaan itu terletak lebih ke atas tertuduh pertama dan bukan tertuduh kedua (lihat perenggan 90). Tambahan pula, tertuduh pertama mungkin telah mengubah atau membuang bungkusan yang terletak dalam bakul pembawa di hadapannya dan meletakkannya lebih dekat dengannya daripada tertuduh kedua. Meskipun ia kelihatan tidak adil di mana

beberapa inci membezakan antara mempunyai jagaan atau tidak, sememangnya jarak kedekatan dan kemudahan untuk tertuduh pertama mendapat bungkusan itu yang membezakan keadaan antara tertuduh pertama dan kedua dan menunjukkan jagaan dan kawalan bungkusan itu terletak padanya dan bukan tertuduh kedua. Dalam keadaan sedemikian, tertuduh kedua tidak mempunyai jagaan dan kawalan ke atas bungkusan merah dan putih tersebut (lihat perenggan 94).

(8) Kegagalan untuk memanggil pemilik motosikal itu tidak memudaratkan. Isu di sini adalah untuk membuktikan 'possession' dadah itu. Dadah itu terkandung dalam bungkusan plastik merah dan putih yang terletak dalam bakul pembawa motosikal tersebut. Oleh itu pemilikan beg plastik putih dan merah dan bukan pemilikan motosikal yang penting bagi tujuan membuktikan satu kes prima facie (lihat perenggan 99).

(9) Meskipun tertuduh pertama mungkin telah membawah barang semasa menunggang motosikal, tiada keterangan lain yang menunjukkan bahawa beliau telah mengambil atau membawa kanabis dari satu tempat ke tempat lain. Dalam keadaan sedemikian fakta-fakta berikut gagal untuk membuktikan 'transport' yang mana tidak ditunjukkan bahawa kanabis itu telah 'conveyed' atau dibawa ke satu tempat lain oleh tertuduh pertama. Tambahan pula bukti diperlukan untuk menunjukkan bahawa pemilikan kanabis oleh tertuduh pertama membentuk pemindahhakkan kanabis tersebut daripada seseorang atau satu tempat ke seseorang atau tempat yang lain, dan bukan sekadar pemilikan pasif. Dengan ketiadaan keterangan sedemikian, 'transporting' dan dengan itu 'trafficking' tidak dapat dibuktikan terhadap tertuduh pertama. Meskipun begitu, dengan ketiadaan penemuan 'possession' terhadap tertuduh kedua, isu 'trafficking' ini tidak timbul langusng (lihat perenggan 101).

(10) Tiada keterangan sama ada terdapat tindakan sebelumnya atau perancangan terlebih dahulu untuk bertindak bersama berdasarkan keadaan sekeliling kejadian tersebut. Bahkan tiada apa-apa percubaan sepanjang penghujahan berlaku yang mengutarakan apa-apa keterangan atau inferens bahawa terdapat 'common intention'. Satu-satunya tindakan yang mana kedua-dua tertuduh boleh dikatakan telah bertindak bersama adalah tindakan berada di atas motosikal dan menunggangnya ke stesen petrol. Dengan ketiadaan apa-apa keterangan selanjutnya dikemukakan oleh pihak pendakwaan terhadap keterangan apa-apa elemen bertindak bersama-sama atau merancang terlebih dahulu untuk bertindak bersama, elemen' common intention' tidak

dibuktikan. Pihak pendakwaan oleh itu telah gagal untuk membuktikan intipati utama kesalahan tersebut di peringkat prima facie (lihat perenggan 105).]

Notes

For a case on common intention of trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 55.

For cases on chemist's evidence, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1418–1423.

For cases on prosecution's burden, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 551–565.

For cases on trafficking of dangerous drugs, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–139.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1 (refd)
Ho Seng Seng v Rex [1951] Brown (refd)
Leow Nghee Lim v Reg [1956] MLJ 28 (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705 (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1 (refd)
PP v Letchumanan a/l Suppiah [2006] 2 MLJ 555 (refd)
PP v Mohamed Ali [1962] MLJ 257 (refd)
PP v Muhamad Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576 (refd)
PP v Nasaruddin Daud & Anor [2006] 6 MLJ 154 (refd)
Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37 (refd)
San Soo Ha v PP [1968] 1 MLJ 34 (refd)
Suresh v State of Uttar Pradesh AIR [2001] SC 1344 (refd)

Legislation referred to

Criminal Procedure Code s 180
Dangerous Drugs Act 1952 ss 2, 6, 15, 37(d), 39A(2), 39B(1)(a)
Evidence Act 1950 ss 6, 114(g)
Penal Code ss 34, 39B(1)(a)

Wan Shaharuddin bin Wan Lamin (Attorney General's Chambers) for the prosecution.
SS Ruban (SS Ruban & Associates) for the first accused.
Joshua Sambanthan (Joshua Sambanthan & Associates) for the second accused.

Nallini Pathmanathan JC:

[1] The two accused persons in this case, Hasbi bin M Kusin ('first accused') and Nurdin bin Basyan ('second accused'), were charged with trafficking in 876g of cannabis under s 39B(1)(a) of the Dangerous Drugs

Act 1952 ('the Act'), punishable under s 39B(2) of the Act read in conjunction with s 34 of the Penal Code. The charge reads as follows in Malay:

> Bahawa kamu bersama-sama pada 5 Jun 2004, jam lebih kurang 11 malam, di kawasan Stesen Minyak Projet, Jalan Meru, di dalam daerah Klang, di dalam negeri Selangor Darul Ehsan, dengan niat bersama telah didapati mengedar dadah berbahaya sejumlah berat 876g Cannabis dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh di hukum di bawah s 39B(2) Akta yang sama dan dibaca bersama s 34 Kanun Keseksaan

[2] Both the accused persons are citizens of Indonesia.

FACTS OF THE CASE

The Surveillance

[3] On 5 June 2004, Lance Corporal Khairulnidzam bin Abdul Latif ('SP3') and three other police officers, namely Detective Corporal Marzuki bin Mohd. Jauhari, Lance Corporal Zulkarnain bin Abdul Rahman ('SP4') and Lance Corporal Uzir Fadzil bin Hj Harun ('the team') were engaged on duty in a police operation called 'Ops Tapis' in the Meru area in Selangor. According to SP3, 'Ops Tapis' was the code name for a surveillance operation undertaken by the Narcotics Department in Klang to locate and identify drug traffickers and drug addicts.

[4] Based on information received, at about 11pm on 5 June 2004, the team positioned themselves inside a petrol station known as 'Projet'. It is located along Jalan Meru. The precise address of the petrol station was unclear, save that there were factories and housing nearby.

[5] The main person in charge of this surveillance operation was SP3 (although the most senior police officer heading the team was Detective Corporal Marzuki). He drove his own car and was dressed in plainclothes. He positioned his car in front of a shop located on the right side of the of the petrol station on entry. The shop carries the name 'Destina'. SP3 sat in front of "Destina" in his vehicle with Detective Corporal Marzuki.

[6] SP4 and Lance Corporal Uzir Fadzil bin Hj Harun had similarly positioned themselves in SP4's motorcar adjacent to SP3's vehicle. These two police personnel were also dressed in plain clothes.

[7] The entire area within and around the petrol station was bright despite the hour because all the lights of the petrol station were switched on and functioning. The petrol station is operational throughout the day and night.

The Ambush and Arrest of the Two Accused Persons

[8] SP3 waited in his vehicle for about 20 minutes to half an hour, after which time he saw two men on a motorcycle enter the petrol station. The motorcycle was of a brand named 'Yamaha'. They entered the station from the main Meru road directly into the petrol station. The two men were not wearing helmets.

[9] They drove the motorcycle into the petrol station and then parked it close to an air pump machine on the far side of the petrol station, along the same side as the 'Destina' shop. Immediately adjacent to the air pump area is a roofed building leading to restrooms (lavatory) and immediately adjacent thereto, is the shop called 'Destina'.

[10] The motorcycle was therefore parked directly adjacent to where SP3's car was positioned. SP3 marked the area where the motorcycle had been parked with an 'X' on exh P3B. SP3 stated in evidence that from a distance of about ten feet he saw 'something' in the basket of the motorcycle. This is what he said:-

> Pada masa yang sama saya pergi ke pam Project minyak di Meru dan nampak sebuah motosikal berjenis Yamaha masuk ke kawasan pam minyak Projet. masuk daripada jalan besar Meru ke pam minyak Projet. Semasa itu saya nampak dua orang menunggang motosikal.
>
> Masa itu saya sama dengan anggota berada di pam minyak tersebut. Motosikal itu masuk dan meletakkan motosikal berhampiran dengan pam angin pam minyak tersebut. Masa itu saya nampak dalam jarak 10 kaki terdapat sesuatu di raga motosikal.

[11] The pillion rider on the motorcycle then got off the motorcycle and went towards the restrooms. The rider of the motorcycle remained on the motorcycle. At this point in time, SP3 and Corporal Marzuki went towards the rider of the motorcycle and introduced themselves as policemen. According to SP3 the rider tried to run away whereupon a short scuffle ensued for a few minutes. The rider was then caught.

[12] In the meantime the pillion rider who had been making his way to the restrooms was arrested by SP4 and Lans Koperal Uzir in the area outside the lavatory. SP4 had been positioned further away but adjacent to SP3. When SP4 and Lance Corporal Uzir sought to arrest the second accused, he resisted

and there was a scuffle for about one or two minutes between the second accused and SP4 and Lance Corporal Uzir, after which the arrest of the second accused was also secured. According to SP4, this scuffle with the second accused took place a few metres away from the spot where SP3 and Corporal Marzuki were arresting the first accused. SP4 and Lance Corporal Uzir then took the second accused to SP3, who was near the motorcycle.

The Items Seized

[13] SP3 took the package he had earlier noted from the basket of the motorcycle. At this point in time, the rider of the motorcycle said 'Tolong lepaskan' which translated in/to English means 'Please let me go'. The package comprised a white plastic bag, with a pattern of logos comprising flowers and the words 'Terima kasih' and 'Thank you' printed all over the bag in red. ('the white and red plastic bag') (exh P7). It was not sealed. SP3 opened the plastic bag in front of both the accused persons and found a solid rectangular block that was in turn wrapped in a transparent plastic covering and aluminium foil. The contents were not therefore patently visible to the naked eye. SP3 then made a cut at one corner of the rectangular block, which he described as a slit, and found the substance to comprise dried plant material, which he suspected to be cannabis. SP4 was present throughout this process. Apart from the first accused's plea above when SP3 took out the package from the basket of the motorcycle, neither of the accused said anything. SP3 then explained to the two accused that they had transgressed the law and that he was arresting them. He retained custody of the white and red plastic bag and its contents as well as the motorcycle. They two accused remained silent throughout this process. SP3 and SP4 conversed with the accused in Bahasa Malaysia. SP3 did not prepare a search-list.

The Investigation by the Police

[14] The two accused persons and the exhibits were then taken to the police station and a police report made. The accused were surrendered to the custody of Inspector Ashari bin Hj. Baidawi, the Investigation Officer ('SP6'). SP3 retained custody of the items seized, save for the motorcycle which was ridden by SP4 back to the station.

[15] SP3 made a police report, namely Kapar Report No 3788/04. After this, SP3 proceeded to place identification marks on the white and red plastic bag (exh P7) as well as the on the transparent outer covering of the rectangular block of plant material (exh 9A/9B). He placed his signature and the date, which by that hour was 6 June 2007, in black ink on these two exhibits. He then surrendered these items into the custody of SP6. The two other exhibits that were seized, namely the Yamaha motorcycle bearing

number plate BCE 4504 and a bunch of keys comprising three separate keys were not marked in like manner by SP3. However SP3 did also formally surrender the motorcycle (which had been driven by SP4) and the keys to the custody of SP6 at the police station. The motorcycle was not physically produced in Court, but was identified through photographs, exhs P3-F and P3-G. It was not in dispute that the motorcycle in these exhibits was the subject motorcycle. A list of the exhibits that were seized was prepared by SP3 when he surrendered the items to the Investigating Officer, SP6 (exh D15). However, this list made no mention of the motorcycle or its keys.

[16] SP6, the Investigating Officer, confirmed that SP3 handed over the two accused persons, the items seized and a police report to him at 2.15am on the morning of 6 June 2007. The items he received were the red and white plastic bag with a signature and the date, 6 June 2007 on it; a rectangular block of plant material covered in transparent plastic and aluminium foil with the marks of a cut at its corner, also bearing the same signature and date, three separate keys and a Yamaha motorcycle bearing registration number BCE 4504. SP6 then placed these items save for the motorcycle in a steel cabinet in his office. The steel cabinet was secured with a lock which remained in the possession of SP6 at all times, according to him. SP6 stated that the motorcycle was kept at an exhibit store in Klang.

[17] The following day, on 7 June 2004 at 9.30am, SP6 took out the exhibits that had been stored in the steel cabinet to enable the photographer, Detective Corporal Mohd. Yusoff bin Harun ('SP1') to take photographs of the exhibits. The photographs of all the exhibits save for the motorcycle were taken in SP6's office. The items were positioned and individually tagged by SP6 prior to the photographs being taken. Photographs of the motorcycle, which was similarly identified and tagged, were also taken.

[18] SP1 also took pictures at the scene of the incident on 8 June 2004 at 11am on the instructions and under the direction of SP6.

The Forensic Tests

[19] On the same day at 3.09pm SP6 handed over the white and red plastic bag, exh P7, and the covered rectangular block of plant material, exh P9A and B to Assistant Superintendent of Police Izanizam bin Salleh ('SP5'). Exhibit P12 evidences the fact and time of such delivery. SP5 is a fingerprints expert and his task was to ascertain whether there were any fingerprints on these exhibits.

[20] On the same night, ie 7 June 2004, SP6 visited the place of the incident at 11pm. He went to the projet petrol station with SP3 and learnt

from him precisely where the motorcycle bearing number plate BCE 4504 identified in Exhibit P3 F and G was positioned at the time of the incident.

[21] As for those exhibits that had been sent to SP5, ie the white and red plastic bag and the rectangular block with its wrapping, he found that there were no discernable finger prints that could be extracted from these exhibits for the purposes of comparing such prints with those of the two accused. SP5 explained that he stored the exhibits when they were not being subjected to testing in a steel cabinet in his office specially utilized for this function and which was locked. No-one else had a key or access to the said exhibits in the cabinet. SP5 returned the exhibits to SP6 on 28 July 2004 after completing his analysis.

The Analysis of the Rectangular Block Suspected to be Cannabis

[22] Some 20 days later, on 17 August 2004, SP6 delivered the white and red plastic bag, exh P7 and the rectangular block of plant material wrapped in transparent plastic covering and aluminium foil (exhs P9A, P9B) to the chemist, Encik Abdul Rahim bin Shadan ('SP2') of the Chemistry Department Malaysia for analysis. SP2 gave evidence in court of the analysis he conducted, as a consequence of which he concluded that the rectangular block of plant material wrapped in translucent covering and aluminium foil was 'cannabis' as defined in s.2 of the Act.

[23] SP2 also confirmed that the exact weight of the cannabis was 876.84g, but that for the purposes of his report he had stated the quantity to be 876g only. The weight of the cannabis to one-hundredth of a gram, ie the 0.84g was disregarded as being insignificant in comparison to the total weight of 876g, in keeping with the guidelines of the Chemistry Department of Malaysia. The guidelines (exh P13) provide that where the weight of a sample submitted is 200g or more then the net weight of the cannabis obtained is to be reported as a unit gram. It is only if the net weight is less than 50g that the weight of cannabis obtained is reported to one-hundredth of a gram or 2 decimal places.

[24] Once the analysis was completed by SP2 the plant material, which by now was no longer a rectangular block but strands of plant material, and the outer wrappings, ie exhs P9A and P9B were returned to SP6 on 7 May 2005. SP6 maintained in his evidence that he retained control of the exhibits throughout the investigation.

Other Salient Facts

[25] SP6 gave evidence that although he was the investigating officer at the

inception of the case, nine days into the investigation, he was transferred to Malacca. Another investigating officer took over the investigation after that time. This other investigating officer who 'replaced' SP6 was not called as a witness.

[26] SP6 maintained that despite his transfer, he was the one who maintained control of the exhibits in this matter. This is indeed borne out by exhibits P4, the document of receipt from the chemist; P5, the chemist's report; P12 the form documenting the handing over of some of the exhibits to SP5 for fingerprint testing and D12 the form documenting the handing over of some of the exhibits by SP3 to SP6. In each instance SP6 was the one who took the exhibits out of his steel cabinet and took them to various places for the requisite tests.

[27] SP6 made some attempts to locate the owner of the motorcycle, but failed. He found that the registered owner of the motorcycle was one Mohammad Zamri bin Rohani whom he interviewed in the course of his investigation. However Zamri had sold the motorcycle to one Kamaruddin who worked with the Fire Department in Perak. SP6 had tried to contact him by telephone on two occasions, but had not managed to meet him.

Burden on the Prosecution at the Close of the Prosecution's case

[28] In accordance with s 180 of the Criminal Procedure Code, at the close of the prosecution case, it is incumbent upon this court to determine whether or not the prosecution has established a prima facie case. As stated by Gopal Sri Ram JCA in *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 (at p 70):

> ... it is the duty of a judge sitting alone to determine at the close of the prosecution's case, as a trier of fact, whether the prosecution has made out a prima facie case.

[29] And further on in the case (at p 81):

> It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.

[30] However the Court of Appeal cautioned further on in the case that (at p 83):

A But we would emphasize and make it amply clear that there is no burden on the prosecution to prove its case beyond a reasonable doubt at the close of the prosecution's case. Whether it has done so, is a question that must be dealt with at the close of the whole case.

B **[31]** And (at p 85):

In our view, subjecting the evidence of the prosecution to maximum evaluation to determine if the defence is to be called does not mean that the prosecution has to prove its case beyond a reasonable doubt at this intermediate stage

C

Ingredients of the Offence against the two accused

[32] The two accused in this case have been charged under s 39B(1)(a) read with s 34 of the Penal Code. Section 39B(1)(a) reads as follows:

D

No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia —

(a) traffic in a dangerous drug;

E (b) .....

s 34 of the Penal Code provides that:

"When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner

F as if the act were done by him alone.

[33] Such an offence is punishable under s 39B(2) which provides:

G Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death.

[34] 'Trafficking' is defined in the Act as: '….doing any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing,

H buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug' [otherwise than under the authority of this Act or the regulations made under the Act];

I **[35]** In the instant case, the charge of trafficking relates to the 'transporting' of the subject drugs which were found in the carrier basket of the motorcycle that was ridden by the first accused with the second accused being the pillion rider. In order to 'transport' drugs, it is necessary in the first instance to be in possession of those drugs. In other words, it is not possible to transport drugs

unless you have possession of those drugs. Accordingly it is necessary that the prosecution prove the inherent element of 'possession' in establishing a prima facie case against the first and second accused of 'trafficking' by transporting. As s 34 of the Penal Code comprises a part of the charge, it is necessary that the prosecution show that the act of trafficking was done by both the accused in furtherance of the 'common intention' of both of them.

[36] The charge as drafted, at first blush might well appear to be a joint charge requiring the prosecution to prove joint possession as well as joint trafficking. (s 170 Criminal Procedure Code). However the express incorporation of the provisions of s 34 of the Penal Code makes it clear that the charge is premised on 'common intention' rather than a joint charge. This issue was not addressed by either the prosecution or the defence. However the issue of whether it is a joint charge or a case of 'common intention' is important as it determines what the prosecution has to prove in order to succeed in establishing the charge. In the instant case, in view of the use of the express reference to s 34 of the Penal Code, I concluded that it is a case of common intention. As a consequence the prosecution need only establish that one of the accused committed an act and that the others participated in it in furtherance of a common intention. As stated by Visu Sinnadurai J in *Public Prosecutor v Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576 (at pp 588–589):

> One of the consequences of a joint charge is that the evidence adduced by the prosecution may not be sufficient to establish the guilt of each and every one of the accused. In cases of common intention the prosecution need only establish that one of the accused committed the act and that the others participated in it in furtherance of a common intention. In cases of joint charges, however, the prosecution must adduce sufficient evidence to establish the guilt of each of the accused as a separate exercise.

The Matters Raised by the Defence

[37] At the close of the case for the prosecution, learned counsel for the first and second accused submitted that the prosecution had not made out a prima facie case. They put forward several grounds to support this contention, which can be summarized as follows:

(i) the first and second accused were not riding the motorcycle BCE 4504 ('the motorcycle') as alleged by SP3 and SP4 on the night of 5 June 2004 at the Projet petrol station in Jalan Meru Klang at 11pm. This evidence was fabricated by SP3 and SP4;

(ii) there was uncertainty as to whether the weight of the drugs found in the carrier of the motorcycle was 876g or 876.84g;

A (iii) there was evidence that SP3 had 'tampered' with the subject drugs whilst this exhibit was in the custody of the police; this amounted to a gap in the chain of the evidence;

(iv) there was no forensic or fingerprint evidence to link both the accused to the subject drugs;

B

(v) the prosecution had failed to show that the first and second accused had possession of the subject drugs;

(vi) the prosecution had failed to prove 'common intention' as required under the charge and s 34 of the Penal Code.

C

Did the Prosecution Make Out a Prima Facie Case Against the Accused?

[38] It now falls to be considered whether the prosecution made out a D prima facie case against the accused. This will require a maximum evaluation of the evidence raised in the course of the prosecution case, as well as the issues raised above by the defence. The duty of the court to undertake a meticulous examination of the evidence is independent of the issues raised by the defence, although the court is inevitably bound in the course of such E examination to consider the numerous issues raised. The purpose of undertaking such an evaluation is to test the credibility of the prosecution's witnesses and to ensure that all the requisite ingredients of the offence have been made out. This in turn requires a thorough examination of the evidence as opposed to a mere cursory review, acceptance and reproduction of the F evidence.

[39] The salient facts that arose during the course of the trial are set out above. The issues below examine the veracity of those facts in the course of addressing the issues raised by the defence.

G

Issue (i): Were the two accused persons riding the Yamaha motorcycle BCE 4504 on the night of 5 June 2004 at the Projet petrol station in Jalan Meru Klang at around 11pm?

H

[40] The evidence adduced by the prosecution in support of this issue is the evidence from two police officers who comprised a part of the raiding party, namely SP3 and SP4. SP3 stated as follows in his evidence:

I

> Pada 5/6/04 jam lebih kurang 11.00 malam saya bersama Koperal Marzuki, Uzir dan Zulkarnain telah membuat tugas Ops Tapis di bahagian Meru. Pada masa yang sama saya pergi ke pam Projet minyak di Meru dan nampak sebuah motosikal berjenis Yamaha masuk ke kawasan pam minyak Projet. Masuk daripada jalan besar Meru ke pam minyak Projet. Semasa itu saya nampak dua orang menunggang motosikal

Masa itu saya sama dengan anggota berada di pam minyak tersebut. Motosikal itu masuk dan meletakkan motosikal berhampiran dengan pam angin pam minyak tersebut. Masa itu saya nampak dalam jarak 10 kaki terdapat sesuatu di raga motosikal. ……

[41] And in cross-examination, SP3 maintained as follows:

Q:Pertama kali Lans Koperal menjumpai atau nampak Tertuduh-tertuduh ialah dalam pam stesen?

A: Tidak setuju. Semasa saya berada di kawasan pam minyak Projet saya nampak mereka menaiki motosikal masuk ke pam minyak dari jalan besar Meru dalam keadaan mencurigai. ……

Q: Tetapi awak jumpa mereka di jalan besar?

A: Saya nampak mereka di jalan besar Meru masuk ke pam minyak.

Q: Semasa awak nampak awak di mana?

A: Saya ada di pam minyak. Mereka masuk dan terus letakkan motosikal dekat dengan pam angin.

Q: Saya katakan bahawa Lans Koperal dan anggota lain menangkap Tertuduh 2 semasa beliau keluar dari tandas manakala Tertuduh 1 di tangkap di dalam tandas.

A: Tak setuju

Q: Saya juga menyatakan bahawa anda dan anggota tidak dapat tangkap tuan punya motosikal kerana beliau telah melarikan diri.

A: Tidak setuju

[42] And during cross-examination by counsel for the second accused:

Q: Jarak kamu lihat motosikal pertama kali berapa jauh?

A: 15–20 metre.

…… ……..

Q:Bilakah kali pertama kamu nampak motosikal Tertuduh?

A: Daripada Jalan Meru masuk ke dalam. Saya di stesen minyak Projet.

Q:Daripada pandangan Lans Koperal kenapa ingat mencurigakan?

A: Kerana pada masa itu hanya sebuah motosikal yang masuk tidak mengisi minyak dipam stesen minyak.dan hanya letakkan motosikal dekat pam angin dekat tandas. Jadi masa yang sama orang menuju ke tandas dan seorang lagi dekat motosikal. Itu mencurigakan.

[43] As for SP4, his evidence was consistent with that of SP3. In examination in chief, he stated as follows:

A Q: Ingat kejadian sebelum buat tangkapan. Apa terjadi?

A: Saya nampak sebuah motosikal jenis Yamaha yang di naiki oleh 2 lelaki dari arah Jalan Besar Meru dan berhenti berhampiran pam angin stesen minyak 'Projet' minyak Meru.

B Q: Semasa mula-mula lihat motosikal di Jalan Besar Meru, berapa jarak kamu?

A: 20-30 metre

.....

Q: Berapa orang di atas motosikal?

C A:Dua

Q: Ketika mula-mula lihat motosikal tersebut boleh camkan siapa yang pembonceng?

A: Ya, boleh cam. (Saksi rujuk ke Tertuduh 2).

D Q: Yang menunggangnya?

A: Saya boleh cam. Beliau dalam kandang pakai baju biru (Tertuduh 2 dicamkan).

Q:Adakah orang yang anda camkan sama dengan orang yang menaiki motosikal di Jalan Meru Besar?

E A: Ya

[44] And in cross-examination by counsel for the first accused:-

Q: Lans Koperal, saya menyatakan semasa membuat penangkapan Tertuduh F pertama ditangkap dalam tandas dan Tertuduh kedua di tangkap bila keluar dari tandas.

A: Tidak setuju.

Q:Saya juga menyatakan apabila Lans Koperal menangkap Tertuduh 2 pada masa keluar dari tandas, tuan punya motosikal telah melarikan diri.

G A: Tak setuju

[45] It was not put to SP3 or SP4 during cross-examination or at any time during the proceedings that the two accused persons were not seen riding the H motorcycle into the petrol station, but that someone else had been on the motorcycle.

[46] It is apparent from the evidence reproduced above that SP3 and SP4 were both clear and consistent in their evidence that they had in fact seen the I first and second accused drive in on a motorcycle from Jalan Meru into the Projet petrol station where they, SP3 and SP4, were already positioned. The suggestions put to SP3 and SP4 in cross-examination did not in any way affect their certainty as to whom they had seen riding the motorcycle on that night.

[47] What was put to them during cross-examination, in effect, was that both accused had been apprehended near the lavatory area and taken to the motorcycle where the incriminating package was. It was also suggested that the owner of the motorcycle had run away. These statements/suggestions made to the two witnesses, SP3 and SP4 did not serve to throw doubt on their version of events as is clear from a perusal of their evidence. The fact that SP3's version of the apprehending of the two accused was corroborated by SP4, refutes at this stage, the proposition put to both of them that the two accused were apprehended near the lavatory area. The fact that both SP3 and SP4 saw both the accused riding into the station also establishes that no other person was riding the motorcycle. As such there appears to be no basis for the proposition that the 'owner' of the motorcycle 'ran away'.

[48] Finally it was submitted that as the two accused were not wearing helmets they could not have been riding the motorcycle. This submission was premised on the basis that no-one carrying such a large quantity of cannabis would actually ride a motorcycle without wearing helmets, for fear of being stopped by the police. The fact that the two accused were not wearing helmets was volunteered by SP4. In fact it was put to SP4 by counsel for the first accused that the accused were wearing helmets, and this suggestion was rejected. From that one piece of evidence alone, it was not possible to conclude that SP3 and SP4 were lying or fabricating evidence to the effect that both the accused were riding the motorcycle with the red and white package in it.

[49] In any event, as stated by Augustine Paul J (as His Lordship then was) in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705:

> As I explained in *PP v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 121:
>
> > A suggestion in cross-examination can only be indicative of the case put forward or the stand taken by the party on whose behalf the cross-examination is being conducted, but to no extent whatsoever can it be a substitute for evidence if it is clearly repudiated by the witness to whom it is made. In this regard it was observed in *Emperor v Karimuddi Sheikh* AIR 1932 Cal 373: 'mere suggestions by a pleader or advocate for the accused do not amount to evidence by the fact suggested, unless they are either partly or wholly accepted of the witness for the prosecution.'

[50] As such the suggestions put to SP3 and SP4 are only indicative of the stance taken by the accused. They serve purely to assist in the evaluation of the evidence of SP3 and SP4. As none of these suggestions were accepted, albeit partly or wholly by SP3 and SP4, they cannot be a substitute for independent evidence of such facts. The suggestions put to these witnesses

did not in any way detract from their evidence that it was the two accused persons whom they saw on the motorcycle that night.

[51] Further in *Public Prosecutor v Mohamed Ali* [1962] MLJ 257, Thomson CJ held with respect to the sworn evidence of witnesses:

> When a police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If he says he saw a cow jumping over the moon his evidence is, of course, not to be accepted, but if he says he saw a cow wandering along one of the main streets of Kuala Lumpur (the sort of thing we all see every day of our lives) there is not the slightest justification for refusing to believe him. Of course if his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the Magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent improbability the evidence of any witness, whether a Police witness or not, who gives evidence on affirmation, should normally be accepted...

[52] There was no inherent improbability in the evidence of SP3 and SP4. Neither were there material contradictions raised in their evidence of having seen the first and second accused on the motorcycle, entering the Projet petrol station at about 11pm on 5 June 2004.

Omission to mention the motorcycle and the keys in the form documenting the surrender of exhibits by SP3 to SP6

[53] A further point that was raised to throw doubt on the credibility of SP3's evidence was that SP3 had not documented the seizure of the motorcycle and the keys in the form recording the transfer and surrender of exhibits to SP6 (exh D15). Accordingly it was suggested that as such fundamental exhibits had not been recorded in D15, this threw doubt as to whether SP3 and SP4 actually saw the two accused on the motorcycle. The proposition was that as D15 was a contemporaneous document there was no reason why SP3 should fail to document the seizure of such exhibits; accordingly their testimony was less than credible.

[54] SP3 gave evidence that he forgot to include the motorcycle and the keys in the form of surrender and transfer of documents to SP6. His actual words were 'terlepas pandang'. It was not however in dispute that the motorcycle was, as a matter of fact, seized and delivered up that night to SP6. The fact of such delivery up of the motorcycle and the keys is evident from the independent testimony of SP4 and SP6. SP4, it will be recalled was the officer who rode the motorcycle back to the station. SP6 also confirmed that he received these two exhibits, although not documented, in the early hours of the morning of 6 June 2004. Further, these exhibits were photographed

together with the exhibits set out in the form of surrender and transfer on 6 June 2004 at 9.30am. Accordingly it is clear that while there was an omission to document the seizure and transfer of these two important exhibits in the relevant forms, there was sufficient independent and corroborative evidence from SP4 and SP6 to show that these exhibits had been received on the very night of their seizure. Accordingly there was no "break" in the chain of evidence, nor did there appear to be any attempt to 'create' and 'link' these exhibits to the accused by reason of the omission of SP3 to include these items in the relevant form.

[55] In *Public Prosecutor v Nasaruddin Daud & Anor* [2006] 6 MLJ 154 Heliliah J (as Her Ladyship then was) considered the issue of the absence of a search list and concluded that it was not fatal to the prosecution's case. While in this case, the issue is the absence of certain items in the list of items seized and delivered up to the Investigating Officer, the principle is similar. In that case, the court also relied on *San Soo Ha v Public Prosecutor* [1968] 1 MLJ 34 where Raja Azlan Shah (as His Highness then was) held as follows:

> The third ground of appeal is that the provisions of s 64 of the Criminal Procedure Code had not been complied with. In my view, the provisions of the section are to be strictly followed to the extent it is possible to ensure that the incriminating articles obtained as a result of the search were recovered as alleged and leaves no room for doubt and to exclude the possibility of any concoction or malpractice of any kind. This section bears some resemblance to section 103 of the Indian Criminal Procedure Code which is more exhaustive than ours. Conviction or acquittal of an accused person invariably depends upon the credibility of witnesses as assessed by the trial court and never on the question whether a particular legal procedure has been complied with. The most that can be said about the failure to comply with the provision relating to the search list is that it may cast doubt upon the bona fides of the parties conducting the search and accordingly afford ground for scrutiny; but if after close scrutiny the court arrives at the conclusion that the stolen articles were recovered from the possession of the accused person, it is obviously no defence to say that the evidence was obtained in an irregular manner. There is nothing in the law which makes such evidence inadmissible.

[56] A scrutiny of the evidence in this case shows that the independent evidence of SP4 and SP6 explain more than sufficiently the inadvertent omission by SP3 to set out the motorcycle and the keys as exhibits seized at the place and time of the incident. Therefore the omission does not throw doubt or create uncertainty with respect to their evidence.

[57] Finally it was contended that the prosecution had not proved its case fully as there was no attempt made by the Investigating Officer, SP6 to procure records of a 'Closed Circuit Television' recording ('CCTV') records which, it was contended would have documented contemporaneously and

accurately the events of that night. While indeed the production of such evidence would have been extremely useful, the issue for consideration is whether the lack of such evidence is fatal to the prosecution's case. It was not clear whether such records were in fact available as SP6, the Investigating Officer was unable to confirm this fact. However, the failure to investigate and ascertain whether there were CCTV records, and produce them if they did exist, was not fatal. The oral evidence of SP3 and SP4 was sufficient to establish prima facie that the two accused were riding the motorcycle, as there were no material contradictions in their evidence and as it was not inherently incredible I found the evidence given by SP3 and SP4 to be credible and therefore accepted their version of the events.

Issue (ii): Was there uncertainty as to whether the weight of the drugs was 876g or 876.84g of cannabis?

[58] Abdul Rahim bin Shahdan, SP2, the chemist gave evidence in the course of trial that he found the net weight of the rectangular block of plant material without its outer wrapping to be 876.84g of cannabis. In his written report, Exhibit P5 he had reported the net weight of the cannabis to be 876g. This is what he said in examination in chief:

> Abdul Rahim bin Shahdan, SP2, the chemist gave evidence in the course of trial that he found the net weight of the rectangular block of plant material without its outer wrapping to be 876.84g of cannabis. In his written report, Exhibit P5 he had reported the net weight of the cannabis to be 876g. This is what he said in examination in chief-
>
> Ini adalah amalan biasa Jabatan Kimia yang mendapati 2 titikan puluhan itu 'insignificant' berbanding dengan berat 876g. Saya katakan 'insignificant' kerana saya gunakan alat timbang yang memberi bacaan kepada 2 titik perpuluhan. Jadi bacaan 2 titik perpuluhan ini mungkin terdapat 'uncertainty'. 'Uncertainty' dalam bidang 'statistik'…

[59] In cross-examination it was put to SP2 that there was a difference of 0.84g in the net weight stated by SP2 in his oral evidence as compared to his written report. He agreed. However he once again explained that it was a written rule or order of practice of the Malaysian Chemistry Department that in the reporting of weights of drugs in excess of 200g, the last two decimal points were omitted as it was statistically 'insignificant'. In other words, it was not necessary to report the weight of a substance weighing more than 200g to the nearest hundredth of a gram, in accordance with the rules and practice of the Chemistry Department.

[60] Both counsel for the accused challenged this by contending that a weight of 0.84g was in fact significant and could attract in itself an offence

under the Act. While agreeing with this, SP2 maintained his stance that his reporting was fully in accordance with the prescribed practice of the Chemistry Department and that there was neither inaccuracy in his written report, nor prejudice occasioned to the accused by this omission. In the course of cross-examination by counsel for the first accused he stated as follows:

Q: Adakah amalan biasa bahawa dua titik perpuluhan 'insignificant'?

A: Ya, setuju ia adalah 'insignificant'.

Q: Amalan biasa ini dalam cara bertulis dalam JKM?

A: Ya

Q: Siapa yang membeir arahan tersebut dan di mana?

A: Dalam Kaedah Analisis. Kalau 0.84 gm. boleh di abaikan.

Q: Setuju dengan saya bahawa 0.84 grams seorang boleh di dakwa di bawah ADB?

A: Ya

Q: Encik Rahim telah membuat kesilapan dalam laporan oleh sebab ada bandingan 0.84 grams?

A: Tidak setuju

[61] And in the course of cross-examination by counsel for the second accused:-

Q: Encik Rahim kata laporan kamu lengkap?

A Ya

Q: Jumlah ialah 876.84 grams?

A: Saya abaikan 0.84 grammes dan laporkan 876 gms sahaja.

……..

A:…Untuk bacaan yang melebhihi 200gm. titik perpuluhan boleh di abaikan.

[62] Saya tidak ada kaedah dengan saya pada masa ini tetapi saya boleh mengemukakannya.

Q: Kaedah ini di buat pada tahun bila?

A: Tak ingat.

Q: Ikut arahan siapa?

A: Kaedah ini telah di 'authorise' oleh Pengarah Forensik. Saya tak ingat namanya.

Q: Kamu juga memberi keterangan bahawa terdapat 'uncertainty' kepada titik perpuluhan.

A: Terdapat 'uncertainty' pada titik perpuluhan

[63] SP2 did, as stated earlier, produce the relevant rule of practice laid down by the Chemistry Department as evidenced by exhs P16 and P13. P16 is the cover page of the Method Authorisation manual for the identification of cannabis utilized by SP2 and authorized by the Head of the Forensic Division of the Chemistry Department. It is to be read in conjunction with exh P13 which relates to that portion of the manual dealing with the reporting of weights. It reads as follows:

14.1 The nett weight of the cannabis obtained is to be reported as follows:

Weight of sample submitted	Weight of cannabis obtained
200 grams or more	Unit gram

[64] It stipulates unambiguously that where the weight of the substance is in excess of 200 grams, reporting is to the nearest gram only. This means that the two decimal points are to be omitted or ignored for the purposes of reporting.

[65] It was also clear from SP2's evidence that the weighing machine that was utilized by him in the Chemistry Department has the capacity to, and does measure the weight of substances not only to the nearest gram but up to two decimal places. Hence while SP2 is able to measure substances with an accuracy of up to two decimal places, where the weight is in excess of 200 grams, the rules require reporting to be in grams only, and the measurement of the substance to the nearest hundredth of a gram is ignored or omitted.

[66] The defence contention is however that there is uncertainty as to whether the weight of the subject drugs was 876g or 876.84g, as SP2 reported the weight to be 876g in his report, but 876.84g in his oral evidence. This it is contended defeats the charge which states that the weight of the drugs was 876g.

[67] A careful consideration of this contention and the evidence shows that there is in fact no doubt created as to the actual weight of the subject drugs as measured by SP2. It is his reporting of the weight that is in issue. There is no doubt that the weight of the drugs to the nearest hundredth of a gram or two decimal places is 876.84g, while the weight to the nearest gram is 876g. Does a reporting that omits to take into account the weight of the drugs to two decimal places create an uncertainty as to the actual weight? It does not. There is no discrepancy that has arisen in relation to the weight. Instead it is the mode of reporting that is being questioned. It merely means that in the

context of drugs in the quantity of hundreds of grams, a reading to the nearest hundredth of a gram or to two decimal places is not warranted, as it is 'insignificant' statistically. This is further borne out by the Rules of Practice adopted and utilized by the Chemistry Department of Malaysia. In the circumstances there is no uncertainty or doubt about the actual weight of the subject-drugs. This issue does not serve to invalidate the prosecution's case.

Condition of the Weighing Scales/Balance

[68] It was also suggested during the cross-examination of SP2 that it was doubtful whether the weighing machine that he used was functioning efficiently because there was insufficient evidence produced to show that it had been calibrated routinely. In the course of SP2 being cross-examined, he was asked whether he had 'excluded the possibility' that the machine was not functioning.

Q: Adakah Jabatan Kimia Malaysia menolak kemungkinan bahawa mesin tersebut dalam keadaan rosak?

A: Tiap-tiap hari sebelum alat timbang di gunakan alat tersebut di "check" untuk menentukan ia befungsi dengan baik.

Q: 'Kita' melakukan 'checking' termasuk Encik Rahim?

A: Maksud saya, kakitangan di Jabatan Kimia Malaysia.

Q: Ada apa-apa bukti bahawa alat timbang di periksa pada bulan Ogos atau September bila barang kes ditimbang?

A: Ada satu buku rekod yang menunjukkan bahawa alat timbang telah di 'check'. Saya boleh bawa buku tersebut ke Mahkamah.

[69] SP2 undertook to produce the above records showing that the machines of the Chemistry Department were routinely checked and calibrated, but did not do so. This failure to produce the records, it was contended, threw doubt on the efficiency and working order of the machines used to weigh the subject drugs. Notwithstanding this failure to produce the relevant records to further evidence the fact that the weighing machines in the Chemistry Department in Petaling Jaya were routinely calibrated during that time, I am of the view that SP2's oral evidence to the effect that calibration was undertaken by the staff of the Department every morning, was sufficient evidence of efforts made to ensure the accuracy and calibration of the machines/scales utilized to weigh the subject drugs.

[70] There was also a suggestion that SP 2 did not carry out the requisite tests to analyse the material given to him because this was not specifically stated in his worksheets, exh P11 (A-C). SP2 met this challenge by pointing out that he gave oral evidence of the test methods he used in determining that

the substance he was asked to analyse was indeed cannabis. SP2 did give detailed evidence of the tests he had carried out. However, as such a test method is routinely utilized in the course of analyzing any sample of cannabis as recommended by the Chemistry Department of Malaysia, it was not necessary to document in his worksheets, the precise method used. The methodology used is a prescribed method stipulated by the Department and used in respect of the analysis of each and every sample of cannabis required to be analysed. This contention was entirely without merit and does not serve to invalidate the fact that the subject drugs were properly found to be 'cannabis' as defined under the Act.

[71] It was therefore established that the subject drugs were indeed cannabis.

Issue (iii): Did SP3 'tamper' with the subject drugs while it was in the custody of the police, such that the exhibit produced in court was not the rectangular block seized by SP3, giving rise to a gap in the chain of evidence?

[72] The contention by the Defence here, centred around a 'cut' on the rectangular block of plant material that had been seized by SP3 after he and his team had apprehended both the accused persons. As stated earlier, SP3 gave evidence that he made a slit in the aluminium foil covering the rectangular block while examining it. He pointed out and marked the area where he had made this cut or slit on a photograph of the rectangular block (see exh P3D). The Exhibit shows that he made the cut or slit in the area at the corner of the rectangular block. This is what he said in examination in chief:

Q: Bila katakan anda memotong barang kes, di mana potong?

A: Di bahagian tepi

Saksi tandakan di mana dia memotong ketulan mampat.

Q: Adakah tempat bahagian bulatan di P3D bahagian di mana awak potong?

A: Ya

In the course of cross-examination by counsel for the second accused this is what he went on to say:

Q: Bila Lans Koperal buka beg plastic, Lans Koperal tengok plastic lutsinar?

A: Ya

Q: Dalam lutsinar ada aluminium foil?

A: Ya, betul.

Q: Adakah Lans Koperal membuka aluminium foil keseluruhannya?

A: Tidak

Q: Kalau tidak buka bagaimana tahu apa barang dalam kertas timah?

A: Bila potong di bahagian hujung saya syaki ia dadah.

Q: Bagaimana potong-potong ketulan mampat?

A: Sebagai 'slit' sahaja.

Q: Rujuk P9A. Bila kata sikit macam mana?

A: Potong sedikit dari ketulan mampat.

Q: Lihat P3D yang kamu bulatkan. Ada cebisan mampat ketulan ialah di potong keluar?

A: Tidak setuju. Saya tidak potong semua.

Q: Kalau tak potong semua, kenapa ada cebisan atau ruang di mampat ketulan?

A: Saya potong kertas timah dan menengok sahaja. Saya tidak mengambil apa-apa.

[73] On the basis of the foregoing, it was submitted by both counsel for the defence that there was evidence of 'tampering' with the subject exhibit while it was in the custody of the police because SP3 denied having made a large 'cut' from the corner of the rectangular block, whereas it was visible from exh P3D that a corner of the material comprising the rectangular block was missing. Moreover, the form documenting the delivery up of the block (exh D15) did not describe the block as having a 'cut'. By reason of this lack of explanation as to the 'cut' seen at the corner of the rectangular block in exh P3D, it was submitted that the block produced in court was not the block that was seized by SP3. There are several possibilities that arise with regards to the 'cut' at the corner of the rectangular block. It is possible that the slit made by SP3 had resulted in a larger cut or crumbling away of the material, or that SP3 had subsequently "made" a cut, or that there had been a cut in the block at the time when it was seized.

[74] The block was in the custody of SP3 for a relatively short time. The sequence of events that evening shows that after examining the block he seized the same, kept it in his custody and returned to the police station with the two accused persons. He made a police report and then proceeded to mark or identify the covered rectangular block he had seized by placing his signature and date on its outer wrapping. He then handed over this exhibit bearing his signature and the date to SP6. After this he had no access to the block.

[75] SP6 in turn placed the exhibit in his steel cabinet and took it out to be photographed the following morning in his office. The photograph P3D shows that the corner of the rectangular block appears to have been cut or crumbled away.

[76] Therefore it may well be the case that the initial cut by SP3 gave rise to further material coming away from the block. While no evidence was available to explain this 'cut' fully, the issue of relevance and consideration for the Court in relation to the rectangular block containing the cut, is this:

[77] Was the block that was seized by SP3 the very same block that was handed over to the custody of SP6 and then to SP5 and SP2 for forensic testing and analysis or was it a different block?

[78] The answer to this is that was the same block that was seized by the police on the night of the incident, stored, analysed and subsequently produced in this court. This is evidenced by the date and signature on appearing on the block. SP3 initialled and marked it on the very night of its seizure, before handing it over to SP6 at 2.15 a.m. It was photographed the following morning at 9.30am and the photographs show the date and initialing by SP3 from the night before. In fact, when SP6 handed over the rectangular block to SP5 the forensic finger print expert the following afternoon, he describes the block as having a 'cut' edge. What ever gave rise to the 'cut' however cannot detract from the significant issue for the purposes of the instant case, namely that the block that was handed over to the chemist, analysed and ultimately produced in court as an exhibit was the same exhibit that was seized by the police from the carrier basket of the motorcycle ridden by the accused persons on the night of 5 June 2004. It was never put to SP3 in the course of cross-examination by counsel for the first and second accused that the plant material produced in court (after analysis) was not the same exhibit that had been seized from the carrier basket of the motorcycle on 5 June 2004. Accordingly there is no merit in this issue of alleged 'tampering' resulting in a gap in the chain of evidence. There was no doubt that the block that was analysed and subsequently produced in court, was the block that was seized.

Issue (iv): Did the first and second accused have possession of the subject drugs?

[79] The charge preferred against the first and second accused alleges that they had possession of 876g of cannabis contained in the red and white package. The issue that falls for consideration therefore is whether either one or both the first and second accused persons had 'possession' of the red and white plastic bag containing the drugs. How then is 'possession' to be determined?

[80] The elements required to prove 'possession' have been considered in numerous cases. In *Leow Nghee Lim v Reg* [1956] MLJ 28 Taylor J dealt with the issue from 'first principles':

The word 'possession' is one of the most difficult of English words. It is derived from posse to be able and sedre to sit or occupy. The fundamental concept is a power of occupation; primarily this referred to land and later the meaning was extended to power of user of a chattel. The primary lay meaning of possess is to hold as property, to own. The primary legal meaning of possess is to have possession, as distinct from ownership. This is well illustrated by the popular phrase for a sheriff's agent, 'A man in possession' Shakespeare more accurately called him a bum bailiff. In this Ordinance custody is distinguished, and I think 'possession' means possession irrespective of whether the possessor is the beneficial owner. Probably the most helpful definition of possession is:

> The relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of other persons.

The definition does not express, but it does imply that the meaning of the word includes some element of knowledge.

A man must know of the existence of a chattel and have some idea of its whereabouts before he can exercise any control over it. The word 'possession' therefore implies some knowledge but not necessarily full or exact knowledge..... How much a man knows about things, in or apparently in, his possession is a matter of fact, to be inferred from all the circumstances.....
The word 'possession' is a vague and general word which cannot be closely defined. Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge. This is recognized in the present Drugs Ordinance which provides, by the presumption already cited, that where a man has custody or control of a drug the onus of proving, first that he did not have possession and secondly that he did not know the nature of the drug, shall be shifted to him.....
The dictionary definition brings in the idea of exclusiveness. It is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude the other persons from enjoyment of the property.

Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions...

[81] From the foregoing passage it is evident that the salient features evidencing 'possession' are custody and control, knowledge of the object of

which such person has custody and control, and the power of disposal of that object. Exclusiveness, while often a feature, is not always essential, as possession can be joint, as can custody and control. However even the then Drugs Ordinance made provision for a statutory presumption whereby once custody and control had been proven, knowledge was statutorily inferred, with the result that the requirements of proof of possession, prima facie, were satisfied, shifting the onus, (although not the burden) of showing that there was no possession or knowledge of the nature of the drug to the accused.

[82] Similarly in *Ho Seng Seng v Rex* [1951] Brown, Ag CJ held:

> I think that the element of knowledge is implicit in the word 'custody' and in the word 'control'. 'Custody' means watching over or keeping safe. You cannot watch over a think or keep it safe unless you know it is there. Similarly you cannot have "control" of a thing unless you know it is there. It follows that in the present case the onus was upon the prosecution to prove to the satisfaction of the court that the appellant knew that a dangerous drug was in the basket. If they had proved that, then s 37(d) would have raised the presumption that the appellant was in possession of it and knew that it was opium

[83] Similarly in the instant case, the prosecution relies on s 37(d) of the Act to prove possession. The said section provides as follows:

> [(d) any person who is found to have had in his custody or under his control anything whatsoever, containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;]

[84] Therefore, the relevant question that has to be considered in the instant case, as a first step towards establishing whether the two accused persons had 'possession' of the subject drugs, is this: Did the first and second accused have custody and control of the red and white plastic package containing the cannabis? If they did, then with the aid of the statutory presumption in s 37(d) they would be deemed to be in possession of the subject cannabis.

[85] The evidence led shows that the first accused was the rider of the Yamaha motorcycle bearing registration number BCE 4504 and that the second accused was the pillion rider. SP3's evidence is that he saw 'something' in the carrier basket of the motorcycle from a distance of about 10–15 feet away. If it was visible to SP3 from that distance, then it follows that the bag would have been visible to both the first and second accused persons. As such both the rider and the pillion rider would have seen and noted the existence of the red and white plastic package in the carrier basket of the motorcycle.

[86] The carrier basket of the motorcycle is located on the inner side of the motorcycle in front of, and between the legs of the first accused when he was sitting astride the motorcycle. The distance between the red and white package and the first accused when he was sitting astride or riding the motorcycle would be a matter of inches. It would follow from the fact of the clear visibility and close proximity between the red and white plastic package and the first accused that he also had custody and control of the white and red plastic package.

[87] Such an approach was approved in *PP v Letchumanan a/l Suppiah* [2006] 2 MLJ 555 where the facts are similar. In that case, the Court of Appeal made a finding of fact that the accused 'must have known of the existence' of an orange plastic packet which was similarly located in the carrier basket of a motorcycle 'right in front of the accused placed between the handle of the vehicle and between his legs when he was riding it'. The orange packet in that case could be seen from a distance of 6–7 feet away. In like manner the red and white plastic package in the instant case could be seen from a distance of about 10 feet away by SP3 when he was carrying out his surveillance exercise in the petrol station. It can therefore be inferred in the instant case that the first accused too must have known of the existence of the red and white plastic package and thereby had such package in his custody or under his control. And the subject cannabis was contained inside the package.

[88] I have considered the issues sought to be put to SP3 and SP4 in relation to the issue of possession, namely that the first and second accused were not on the motorcycle but in or around the lavatory area when they were arrested. The suggestion made during the cross-examination of these witnesses was that the first and second accused were not riding the motorcycle at the material time and could not therefore have been in possession of the red and white plastic package or the drugs that night. This issue has been dealt with above. At this stage, having considered the evidence of SP3 and SP4 in toto, I find them to be credible witnesses. There appears to be no basis at this stage warranting a finding that they fabricated the entire evidence about the first and second accused being on the motorcycle containing the package with the drugs. The suggestions put forward by defence counsel did not have the effect of adversely affecting the credibility of SP3 and SP4.

Did the second accused have possession of the subject drugs?

[89] The second accused was the pillion rider. As he was sitting close to the first accused and a few feet away from the carrier basket, the red and white plastic package in the carrier basket of the motorcycle would have been visible

to him. Can it then be concluded that as he too was relatively close to the package and could see it that he also had custody and control of the package?

[90] To my mind, it would appear not. Although the red and white package was visible to him and relatively proximate to him, the presence of the first accused as the rider who had control of the motorcycle and the carrier basket comprising a component part of the motorcycle within which the drugs were contained, suggest that control and custody was with the first accused rather than the second accused. There was no evidence to suggest that the second accused had equal or greater access to, or control over the drugs in the red and white package. At all times it was the first accused who had ready accessibility and "control" or custody over the package as compared to the second accused, who as the pillion rider could not exercise such control over the package either with, or to the exclusion of the first accused.

[91] It should also be considered that the red and white package was not situated between the pillion rider's legs as he was seated astride the motorcycle immediately below him, as was the case with the rider.

[92] When the two accused persons were pounced upon at the Projet petrol station, it will be recalled that the first accused remained on or near the motorcycle, while the second accused was walking towards the lavatory. This again suggests that the first accused appeared to assume greater responsibility for the red and white plastic package in that he remained at or on the motorcycle, close to the package.

[93] The first accused also pleaded with SP3 to let him go, when SP3 proceeded to examine the contents of the red and white plastic package. While not too much weight can be read into this plea when viewed in isolation, as it could well reflect the plea of any person stopped by the police, when viewed in conjunction with the rest of the evidence, namely:

(a) the visibility and proximity of the red and white package;

(b) the presence of the first accused near it at all times, and the fact that

(c) the first accused as the rider of the motorcycle had custody and control of the vehicle and the carrier basket containing the red and white plastic package;

it suggests that it was the first accused who had custody and control of the red and white package, rather than the second accused.

[94] It may well be queried why 'joint possession' cannot be inferred from the fact that both accused could readily see the package and therefore probably had knowledge of the existence of the cannabis in the package.

However it cannot be said that the package was so proximate to the second accused that he could have access to it and deal with it to the exclusion of the first accused. On the facts before the court, the first accused could on the other hand, have dealt with or disposed of the package which was situated in the carrier basket in front of him and proximate to him to the exclusion of the second accused. While it may seem inequitable indeed that a matter of inches should make a difference between having and not having custody, it is indeed the proximity and accessibility of the first accused to the package which distinguishes the situation between the first and second accused and points towards custody and control of the package being with him rather than the second accused. In these circumstances, I concluded that the second accused did not have custody and control of the red and white package.

[95] Having established that custody and control of the red and white plastic package is with the first accused, how does that relate to 'possession' of the subject drugs? By virtue of s 37(d) of the Act, it follows that as the first accused was found to have had in his custody or under his control, the red and white plastic package containing 876g of cannabis, he is deemed to have known the nature of such drug until the contrary is proved. With the aid of the statutory presumption in s 37(d) of the Act, knowledge is inferred, thereby fulfilling the necessary ingredients to show 'possession'. It can therefore be concluded that for the purposes of establishing a prima facie case, the prosecution has succeeded in showing that the first accused had possession of the subject cannabis.

[96] A further issue that was raised by the defence in relation to the issue of 'possession' was that the owner of the motorcycle was neither ascertained fully nor called to testify in court, resulting in a material gap in the chain of evidence which would also impinge upon any finding of 'possession'. This also warranted an adverse inference being drawn against the prosecution in line with s 114(g). This issue is considered next.

Issue (v): The investigation undertaken by SP6 was incomplete as the owner of the motorcycle was neither ascertained nor called to testify in court

[97] The defence contended that the entire investigation conducted was improper as no attempt was made to ascertain fully and properly who the owner of the motorcycle was; neither was the owner called to testify in court. In examination in chief, SP6 stated:

Q: Adakah kamu tahu siapa pemilik berdaftar motosikal?

A: Ya. Mohammad Zamri bin Rohani.

And in cross-examination by counsel for the first accused:-

A Q: Berkenaan dengan motosikal, tadi SP6 menyatakan bahawa motosikal kepunyaan Mohamad Zamri. Adakah Inspektor buat siasatan di JPJ?

A: Ada. Semakan dalam daftar polis, tapi bukan di JPJ.

…… Q: Ada membuat temuduga dengan
B Mohamad Zamri?

A: Ya, ada. Mohon rujuk kepada I.P.

Q: Kenapa kamu tidak menjumpai Encik Kamaruddin?

A: Saya cuba menemui Encik Kamaruddin tetapi tidak berjaya.

C Q: Kamu kata dia Ahli Bomba di Perak?

A: Ya.

Q: Apakah langkah yang di ambil oleh anda?

D A: Saya telah menghubungi Ahli Bomba Negeri Perak.

Q: Adakah kamu pergi ke Perak untuk jumpa dengan Kamaruddin?

A: Tidak

Q: Berapa kali cuba menjumpainya?Q: Berapa kali cuba menjumpainya?

E A: Tak ingat. Saya cuba menghubungi melalui handphone.

Q: Berapa kali melalui Jabatan Bomba?

A: Dua kali. Kali pertama saya minta kedudukan di mana Kamaruddin bertugas dan kali kedua mendapat pengesahan dari Jabatan Bomba, Perak.
F Encik Kamaruddin bertugas di Balai Bomba Seri Iskandar Perak.

Q: Saya juga katakan sebagai Pegawai Penyaisat kamu tidak lakukan siasatan terperinci ke atas tuan punya motosikal? A: Tidak setuju

G **[98]** The issue that arises for consideration is whether the failure or omission to produce the owner of the motorcycle at trial to testify as to the ownership of the motorcycle is fatal to the prosecution's case. This issue has been dealt with in *PP v Letchumanan a/l Suppiah* [2006] 2 MLJ 555. The facts of that case are substantially similar to this case. There the
H prosecution failed to call the owner of the motorcycle, the accused's brother and the learned trial judge held that the failure to do so was fatal to the prosecution's case pursuant to s 114(g) of the Evidence Act 1950. On appeal, this is what the Court of Appeal held (at p 563):

I … this issue of the ownership of the motorcycle is an irrelevant one. The issue is one of custody or control of the orange plastic packet in the carrier basket of the motorcycle which in the circumstances of this case would not involve the ownership of the motorcycle on which the accused was riding wherein in the carrier basket within sight of the accused and the police party was found 'anything whatsoever containing any dangerous drug.' If the defence had been called the

> accused might be able to explain away the presence of the plastic packet in the basket in front of him. But that is a different matter altogether. …The case against the accused was based on the observation made by PW5 and his team prior to the arrest and the accused's conduct which clearly showed that the accused was in custody or control of the orange packet in the carrier basket of the motorcycle … In our view, without calling Ganeson a/l Suppiah (the owner of the motorcycle) the prosecution was able to discharge the burden of establishing possession with knowledge of the drugs in the accused without the aid of the presumption under s 37(d) of the Act. The ownership of the drugs was never in issue. Custody or control of them would suffice to constitute an essential step in the direction for a charge under s 39B of the Act.

[99] In light of the approach adopted by the Court of Appeal in *Letchumanan a/l Suppiah*'s case, it follows that the failure to call the owner of the motorcycle in the instant case, is not fatal. What is in issue is establishing the 'possession' of the drugs. The drugs are contained in the red and white plastic package which in turn was located in the carrier basket of the motorcycle. As such it is possession of the white and red plastic bag and not ownership of the motorcycle is fundamental for the purposes of establishing a prima facie case. The failure to call the owner to testify is therefore not fatal to the prosecution case.

'Trafficking'

[100] On the issue of 'trafficking' the prosecution sought to establish this ingredient of the charge by relying on s 2 of the Act which includes in its definition of 'trafficking', the act of 'transporting' dangerous drugs. It was submitted that as the first and second accused were riding a motorcycle containing the red and white package containing the subject drugs, they were in effect "transporting" the cannabis. At this stage the submission is only of relevance to the first accused in view of the court's finding that the second accused did not have 'possession' of the drugs. Moreover the fact that the quantity of cannabis was far in excess of an amount that would be utilized for personal consumption, was in itself sufficient to warrant an inference of 'trafficking' as set out in, inter alia, *Ong Ah Chuan v PP* by Lord Diplock:

> Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible — even if there were no statutory presumption such as is contained in s 15 of the Drugs Act

[101] In the instant case it appeared that while the first accused may well have been carrying the goods while riding a motorcycle, there was no other evidence which showed that he was taking or conveying the cannabis from one place to another. It was not evident where he had come from, or where he was headed. He was apprehended when he parked the vehicle at the petrol station. This could have been his final destination or otherwise. In these circumstances these facts fail to evidence 'transport' in that they does not show that the cannabis was 'conveyed' or taken from one particular place to another by the first accused. Further proof was necessary to show that the first accused's possession of the cannabis amounted to a conveyance of the cannabis from one person or place to another, rather than mere or passive possession. In the absence of such evidence, 'transporting' and thereby 'trafficking' could not be established against the first accused. Needless to say, in the absence of a finding of 'possession' as against the second accused, this issue of 'trafficking' did not even arise.

Has 'common intention' under s 34 of the Penal Code been proven?

[102] In order for the prosecution to succeed in establishing a prima facie case against the first and second accused on the charge as drafted, it was necessary for the prosecution to prove 'common intention' under the provisions of s 34 of the Penal Code. The section provides as follows:

> Where a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone

[103] The charge as drafted envisages proving that the first and second accused both, in furtherance of a common intention, trafficked in 876g of cannabis on 5 June 2004 at the Projet petrol station in Jalan Meru, Klang at 11pm.

[104] In *Sabarudin bin Non & Ors v PP* [2005] 4 MLJ 37 Gopal Sri Ram JCA held as follows in relation to proof of 'common intention' (at pp 50–51):

> To deal with the criminal liability of the second and third accused, it is necessary first to quote from two recent authorities to remind ourselves of the law governing s 34. In *Suresh v State of Uttar Pradesh* AIR [2001] SC 1344, Sethi J speaking for himself and Agrawal J said:
>
> > Section 34 of the Indian Penal Code recognizes the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same

as if each of them had done it individually. There is no gainsaying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. *Such a pre-concert or preplanning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of an occurrence and on a spur of the moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.* (Emphasis added.)

[105] The definition of 'common intention' for the purposes of this case therefore requires some act of prior concert or pre-planning to act together which should precede the act constituting the offence, namely trafficking of the cannabis. It is a question of fact to be inferred from the circumstances of the incident. In the instant case there was no evidence of either prior concert or pre-planning to act together that could be gleaned from the circumstances surrounding the incident. Nor was any attempt made during the course of submissions to highlight any evidence or inference that could be drawn of such 'common intention'. The only act in respect of which the two accused persons can be said to have acted in unity is the act of being on the motorcycle and riding into the petrol station. In the absence of any further evidence being adduced by the prosecution to evidence any element of acting in concert or pre-planning to act together, the element of 'common intention' is not proved. The prosecution has therefore failed to prove an essential ingredient of the offence at the prima facie stage.

Consequences of failure to establish possession of the subject drugs by the second accused and 'common intention' under s 34 of the Penal Code

[106] From the foregoing it is evident as neither the element of 'possession' or 'common intention' has been established against the second accused, the charge against the second accused fails, as an essential element for the offence of trafficking was not proved. The second accused was neither in 'possession' of the subject drugs, nor did he share a 'common intention' with the first accused to 'traffic' in drugs. Therefore he cannot be said to have 'trafficked' in the 876g of cannabis on the night of 5 June 2004.The second accused is therefore discharged and acquitted of the charge brought against him.

[107] It also follows from the failure to establish 'common intention' that the charge as drafted fails against both the first and second accused, as the essential ingredient of the charge under s. 34 of the Penal Code, which is expressly stipulated, has not been proved. In short, the prosecution has failed to disclose a prima facie case against the first and second accused of trafficking in 876g of cannabis on 5 June 2004 with common intention.

As the charge as drafted fails, are both the first and second accused acquitted of all charges under the Act?

[108] A further point that was put forward by the defence was that as the prosecution had failed to prove 'common intention' both the accused should be acquitted, citing *Abdullah Zawawi bin Yusoff v PP* [1993] 3 MLJ 1. In that case, the then Supreme Court held as follows in relation to a joint charge of trafficking preferred against a husband and wife (at pp 8–9):

> In this context we are reminded of the case of *R v Abbott* [1955] 2 All ER 899, where Lord Goddard CJ delivering the judgment of the Court of Appeal of England, said this (at p 901E to G):
>
> ….If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If, in those circumstances, it were left to the defendants to get out of it if they could that would put the onus on the defendants to prove themselves not guilty. Finemore J, remembers a case for murder, and there was evidence that they had both been in the room at the time the murder of the boy was committed; but the prosecution could not show that sister A had committed the offence or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which, and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained that the prosecution should prove its case...

[109] The cases cited above are authority for the proposition that where two persons are jointly charged and the evidence adduced by the prosecution points neither to one or the other in relation to the commission of a crime, both should be acquitted. In the instant case, in the first instance, it would appear that the charge as drafted is not a 'joint charge' but instead is a case of 'common intention' as appears from the express use of s 34 of the Penal Code. Therefore the above would not be applicable.

[110] Even if the charge as drafted is construed as a 'joint charge', it cannot be concluded sine qua non, that as the second accused stands discharged and acquitted, the first accused similarly stands acquitted as envisaged in *R v Abbott* and *Abdullah Zawawi*. This is because it cannot be said that the evidence does not point to one accused rather than the other. The evidence here does disclose that the first accused, rather than the second accused, had custody and control of the subject drugs. At this prima facie stage, with the first accused being 'deemed' to have knowledge of the nature of the drugs, through the aid of the statutory presumption provided by s 37(d) of the Act,

there is sufficient evidence of his 'possession' of 876g of cannabis which is an offence under the Act. Accordingly, at the end of the case for the prosecution I held that the second accused stands discharged and acquitted. The first accused was called upon to enter his defence upon an amended charge for an offence under s 6 of the Act punishable under s 39A(2). The amended charge reads as follows:

> Bahawa kamu pada 5 Jun 2004, jam lebih kurang 11 malam, di kawasan Stesen Minyak Projet, Jalan Meru, di dalam daerah Klang, di dalam negeri Selangor Darul Ehsan, telah di dapati di dalam milikan kamu dadah berbahaya ia itu cannabis seberat 876g dan dengan itu kamu telah melakukan satu kesalahan di bawah s 6 Akta Berbahaya 1952 dan boleh di hukum di bawah s 39A(2) Akta yang sama.

[111] The charge was marked as exh 'P17'. It was translated for the benefit of the first accused into the Achenese language. I was satisfied that the first accused understood the contents of exh 'P17' and the consequences of pleading guilty to such a charge. He then pleaded guilty. As I was satisfied that he understood both the nature of the charge and the consequences of pleading guilty I accepted his plea. He was duly convicted under s 6 of the Act. His counsel put forward a plea in mitigation, stating inter alia that the first accused, aged 32 was an Indonesian man who had come to Malaysia to earn a living as a construction worker. He was a first offender and had no previous convictions. In arriving at a suitable sentence, the interests of the public which requires the imposition of a deterrent sentence was considered, as was the statutory ambit of s 39A(2), as well as the weight of the drugs in the instant case, which is seventeen times the statutory limit. As against these factors, the fact that the accused is a first offender and his plea of guilt was considered. I concluded that the appropriate sentence to be imposed against the first accused in this case is term of imprisonment of 14 years and 10 strokes of the whipping, which sentence is to run from the date of arrest.

Order accordingly.

Reported by Loo Lai Mee